Irvin H. Whitehouse & Sons Co., Inc. *and* James A. Dennis

International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union 118, AFL–CIO *and* James A. Dennis. Cases 9–CA–28687 and 9–CB–7949

December 11, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On April 22, 1992, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent Employer filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt his recommended Order.

In affirming the judge's finding that Respondent Whitehouse violated Section 8(a)(3) and (1) of the Act by terminating James A. Dennis for refusing to join Painters Local 118,[2] we rely on the following findings by the judge.

Johnny Johnson, Whitehouse's superintendent, advised Dennis at the time of hire in May 1990 that his only obligation was to meet the membership requirements imposed by Painters Local 768. On April 29, 1991, Johnson again advised Dennis that he could return to the Dow Corning job (in Painters Local 118's jurisdiction) if he paid his obligations to Local 768 because Johnson, like Dennis, was under the impression that this would satisfy Local 118 Business Manager Bolton. However, when Johnson learned that Dennis' payment in full to Local 768 did not satisfy Bolton, Johnson told Dennis that he was being laid off because he could not work in Local 118's jurisdiction and there was no work for him in Local 768's jurisdiction. In fact, letters from Whitehouse to the state employment office and from its attorney to the Board's Regional Office reveal that Johnson did not simply lay Dennis off from the Dow Corning job. Rather, Dennis was terminated from any employment with the Company in any location, and this was done for the asserted reason that Dennis refused to join Local 118.

In these circumstances, we find, in agreement with the judge, that Respondent Whitehouse violated Section 8(a)(3) and (1) by terminating Dennis because, although he had joined Local 768, he had not satisfied Bolton by joining Local 118. In so holding, we do not rely on the judge's further finding that Johnson ''knew or had reason to believe'' that Bolton did not offer membership in Local 118 to Dennis on the same terms and conditions generally available to others.[3]

ORDER

The National Labor Relations Board orders that Respondent Irvin H. Whitehouse & Sons Co., Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, and Respondent International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union 118, AFL–CIO, Louisville, Kentucky, its officers, agents, and representatives, shall take the action set forth in the recommended Order.

[1] Respondent Employer has excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] No exceptions were filed to the judge's finding that Respondent Painters Local 118 violated Sec. 8(b)(1)(A) and (2) by threatening to blackball and attempting to cause and causing Respondent Whitehouse to discharge James A. Dennis unless he paid a $500 initiation fee in one lump sum and became a member of that union.

[3] Member Oviatt agrees with the judge that Respondent Employer violated Sec. 8(a)(3) and (1) of the Act by discharging employee Dennis. Respondent Employer had reasonable grounds for believing that membership in Respondent Union was not available to employee Dennis on the same terms and conditions generally available to other members. Member Oviatt believes that under the circumstances presented here, Respondent Employer was under an obligation to make further inquiries concerning Dennis' status before discharging him. Respondent Union's business manager Bolton advised Respondent Employer's superintendent Johnson that Dennis was not a member of either Respondent Union or Local 768. Dennis, however, thereafter told Johnson that he was ''squared away'' with Local 768. Before discharging Dennis, Johnson, therefore, should have asked Bolton if Dennis would be eligible to work in Respondent Union's jurisdiction as a Local 768 member. In addition, the fact that Respondent Union's request for discharge came within 90 days of the start of Dennis' work in that jurisdiction should have prompted an inquiry about whether the request was premature. Johnson had earlier told Dennis that he had to pay off the balance of his initiation fee and back dues. Under the constitution of the International Brotherhood of Painters and Allied Trades, Dennis would have had 90 days in which to pay the balance of his initiation fee to Respondent Union.

Eric A. Taylor, Esq., for the General Counsel.
Charles F. Merz, Esq., of Louisville, Kentucky, for Respondent Company.
James E. Isenberg, Esq. and *Thomas Schulz, Esq.*, of Louisville, Kentucky, for Respondent Union.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Louisville, Kentucky, on February 6 and 7, 1992. The charges and the amended CB charge were filed respectively on June 24 and August 9, 1991, by James A. Dennis, an individual. The consolidated complaints,

issued on August 13, 1991, and amended at the hearing, allege that International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union 118, AFL–CIO (Union or Local 118) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, by threatening to blackball Dennis unless he immediately paid a $500 initiation fee, and attempting to cause and causing Irvin H. Whitehouse and Sons Co., Inc. (Company and collectively with the Union, the Respondents) to discharge Dennis because he refused to become a member of the Union, and for reasons other than Dennis' failure to tender periodic dues and the initiation fees on proper notification uniformly required as a condition of acquiring or retaining membership in the Union. The complaints further allege that the Company violated Section 8(a)(1) and (3) of the Act by terminating Dennis because he failed to join, support, or assist the Union and in order to encourage employees to join, support, and assist the Union. Respondents each deny the commission of the respective alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

On the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by General Counsel and Respondents, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a corporation, is engaged in the application of commercial and industrial coatings, treatments, and related services from its Louisville, Kentucky facility. In the operation of its business, the Company annually purchases and receives at its Louisville facility goods and materials valued in excess of $50,000 directly from points outside of Kentucky. I find, as Respondents admit, that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Five witnesses testified in this proceeding. The principal witnesses were Charging Party Dennis, Union Business Manager Ronald Bolton, and Company Vice President for Production Johnny Johnson, who was company superintendent at the times material. Another person involved in the events, who might have provided enlightening testimony, was not called as a witness. None of the three principal witnesses were wholly credible. Testimony by Dennis and Johnson was refuted by documents whose authenticity is undisputed. Their lack of credibility has not aided resolution of their conflicting assertions concerning the events of this case. Nevertheless, a fairly clear picture emerges from the maze of conflicting testimony.

The Union, based in Louisville, is signatory to a collective-bargaining contract with the Company, effective from July 23, 1990, to July 22, 1993, covering the Company's painting work within the Union's geographical jurisdiction. That jurisdiction includes 28 counties in Kentucky and 7 in nearby Indiana. The Union's territorial jurisdiction does not extend to the Lexington, Kentucky area. Local 768 is the Painters' Union local in Lexington. The Union has seen better days, but it is a powerhouse compared to Local 768. Business Manager Bolton testified that his union has nearly 300 members, compared to between 30 and 35 members for Local 768. The contract between the Company and the Union contains a union-security clause which requires union members to maintain their membership, and nonmembers to join the Union after 8 days of employment, all as a condition of employment. The Company and the Union do not have an exclusive hiring arrangement. The Company may hire employees off the street, but they become subject to the union-security clause. Although the clause uses the words ''join the Union,'' General Counsel does not allege that the clause is unlawful. The contract also provides that the Company will withhold union initiation fee payments if the employee signs an authorization form to withhold a designated amount. Payment is due on a monthly basis with a maximum of 90 days to pay total initiation fees. The evidence indicates that the Company has a relationship with Local 768 when working in its jurisdiction. However, no evidence was presented concerning any collective-bargaining contract between them. In the absence of such evidence I cannot assume the existence of a contract containing a union-security clause. Therefore I am proceeding on the premise that company employees working within the territorial jurisdiction of Local 768 had no obligation to join, be referred by or pay dues or other money to that Local.

Until August 5, 1991, the initiation fee for both the Union and Local 768 was $275. Effective as of that date the Union's initiation fee was increased to $500. The Union also inquired, as of the spring of 1991, that new members pay 3 months' dues at $27.50 per month, a work assessment fee of $21 and $3 for work cards, for a total of $381.50 in the first 90 days. Local 768 evidently also had charges in addition to the initiation fee. The constitution of the International Brotherhood of Painters and Allied Trades, which is binding on all its affiliated locals, provides that new members must sign an official application form, initially pay the current month's dues and at least 10 percent of the initiation fee, continue paying all dues and assessments, and complete payment of the initiation fee within 90 days. ''If complete and full payment of the initiation fee is not made within 90 days, or if it is discovered that the applicant has made false statements or is unable to qualify as a member, the membership shall be revoked and the paid initiation fees forfeited.'' The constitution also provides that no member shall at any time belong to more than one local. The constitution also provides a procedure whereby members may be cleared to work outside the jurisdiction of their home local. In sum, in order to qualify for such clearance, the person must have been a union member for at least 1 year (unless an exception is granted by the International), and must be current in his payments. The member goes to the financial secretary of his home local, who if the member is qualified, will give him a clearance card, which costs $2. The member then goes to the local in whose jurisdiction he wishes to work, and obtains a transfer card, which also costs $2. If the person has been a union member less than 3 years, he must also pay the

accepting local the difference between the initiation fee of that local and his home local, if the accepting union has a higher initiation fee. The contract between the Company and the Union provides pay scales for ''Class A'' and ''Class B,'' painters, with Class A painters making $2.50 per hour more than Class B painters. The contract provides that: ''All new Journeymen and all new recruit people are permitted automatic Class B Painters until skill level requirements are recognized by employing employer.''

James Dennis was an experienced painter, but at least until May 1990 had not been a member of the Painters Union. He obtained his painting experience in the military and through his own construction business. In May 1990 the Company hired Dennis off the street, and assigned him to work at the Toyota plant in Georgetown, Kentucky, which is in Local 768's geographical jurisdiction. Dennis testified that he filled out two application forms, although only one was presented in evidence. That form is dated May 17, 1990.[1] The form, signed by Dennis, indicates in response to an inquiry that he was a member in good standing of Local 768. Dennis testified in sum as follows: Superintendent Johnson, who initially interviewed and hired Dennis, told him to contact Business Manager Doug Young of Local 768, who would get him into that union. Johnson told Dennis he would be working at the Toyota plant, and he should put down on his application that he was a member of Local 768, because he would be working in that Local's jurisdiction. The next day Dennis met with Young, who told him the initiation fee was $275. Dennis gave him a down payment of $50 for the fee. Neither Young nor anyone else ever gave him a copy of the Painters Union constitution or its rules, and he never asked for them. When Dennis reported to the jobsite he filled out an application for Company Project Manager Daryl Ford, indicating that he was a member of Local 768. Superintendent Johnson, who is a member of the Union, testified in sum as follows: He told Dennis that if he wanted to work at Toyota, he should get straight with Local 768 if he was not already. Company policy required that its painters be in good standing with their respective locals and have their work cards. The Company did not care if its employees were union members if the business agent did not care. Dennis probably filled out the application (in evidence) at the jobsite and gave it to project manager Ford. (Ford verified the employment eligibility portion of the application.) If an employee stated on his application that he was a union member, but knew he was not, the application would be false and invalid and the employee would be terminated. Local 768 Business Manager Young was not called as a witness in this proceeding. General Counsel represented that he subpoenaed Young, not to call him as a witness, but to have him present in the event a hearsay issue arose as to the conversations involving Young; and that Young failed to show at the hearing.

The receipt for Dennis' $50 downpayment on the Local 768 initiation fee, signed by Young, is dated June 23, more than 5 weeks after Dennis began working for the Company. Nevertheless Dennis insisted that he paid the money when he began working, and professed to be unable to explain the date. Dennis also identified receipts for two other payments toward the initiation fee, both signed by Young. The first, dated July 18, was for $75, and indicated that Dennis had paid a total of $165 and still owed $148.05. The second, dated September 7, was for $50, and indicated that Dennis paid a total of $215 and owed a balance of $98.05. Dennis testified in sum that he did not make any other payments on the initiation fee prior to April 30, 1991, that he did not sign any authorization to deduct initiation fee payments from his wages, and that no such deductions were made. However union dues were deducted from his paychecks whenever and wherever he worked. (During his employment he worked within the geographical jurisdiction of four Painters Union Locals: Local 768, Local 118, and Indiana Locals 47 and 669.) He did not know which Local received the dues, but assumed that they went to the Local in whose area he worked. When he was not working he paid no dues. In sum, Dennis paid a total of $175 toward the Local 768 initiation fee. He was unable to explain why the July 18 receipt indicated that he paid $165, when he had paid only $125 at that point.

The evidence discussed thus far demonstrates certain courses of conduct by the Company, Dennis, and Local 768. The Company and Superintendent Johnson in particular, seemed to regard itself as the guardian of Painters Union interests, and did not concern itself with the niceties of the law in carrying out that function. It is unlawful to question a job applicant concerning his union membership. The Company had the right, and indeed the responsibility to inform a new employee of any union-security obligations. However this does not give the employer any right to question applicants about their union membership. Johnson also unlawfully required Dennis to meet Local 768's membership conditions before working for the Company. In the absence of any lawful union-security clause, that requirement was plainly unlawful. Even if the Company had a contract with Local 768 which was similar to its contract with Local 118 (and this has not been shown) any membership obligation would commence on the 8th day of employment. Johnson in effect imposed an unlawful closed-shop requirement, making union membership a precondition of employment. The evidence also indicates that Dennis had no principles against union membership, but was not inclined to meet the financial obligations of such membership. Dennis falsely informed Project Manager Ford that he was a member in good standing of Local 768, but waited over 5 weeks before contacting that union. Thereafter he failed to complete payment of his initiation fee. The evidence further indicates that Business Manager Young, who was desperate for members at any price, tolerated this situation, in violation of the Painters' International constitution, by accepting whatever Dennis was willing to give him.

Dennis continued to work at the Toyota plant until late July. In July he also worked briefly on a shutdown job (i.e., where a plant is temporarily shut down for general maintenance work) at Cummins Diesel, in the geographic jurisdiction of Indianapolis Local 47. In late July he worked for 2 days on a shutdown job at the Phillip Morris plant in Louisville, for the first time working within Local 118's jurisdiction. Thereafter, and continuing until mid-September, Dennis worked at various jobs within Local 118's jurisdiction, including General Electric and a second shutdown at Phillip Morris in late August. In late September and October Dennis again worked at the Toyota plant. In late October Dennis

[1] All dates are for the period May 15, 1990, through May 14, 1991, unless otherwise indicated.

commenced working at the Lilly plant in Indianapolis (Local 47 jurisdiction). He continued working there until late December, and after briefly working at another Indiana job (jurisdiction of Local 669) he was laid off on December 28. Dennis testified that he was a foreman on the Lilly job. However his timecards indicate that he received the same rate of pay as other journeymen on his shift. I do not credit his assertion. In March the Company recalled Dennis, and assigned him to the Dow Corning plant in Carrollton, Kentucky, which is in Local 118's geographic jurisdiction. He worked there until his alleged termination on April 30.

So far as indicated by the present record, Dennis had no contact with the Indiana locals when he worked in their territory. He testified that he met Union Business Manager Bolton only once. Dennis testified in sum as follows: He met Bolton in August 1990, on the second Phillip Morris shutdown job. Bolton asked him if he had his book, and what local he was with. Dennis answered he was in an initiation program with Local 768. Bolton said that as soon as Dennis' book was paid up and his dues caught up, he saw no problem with Dennis transferring his book to Local 118. Dennis said he had no problem with that. (Dennis lived in Louisville.) Bolton did not say that had to transfer his book. Thereafter he had no further contact with Bolton or anyone else concerning his union standing until April 30. He did not work on any shutdown job at Phillip Morris in April. He worked only at Dow Corning that month. His last day of work was Thursday, April 25. He did not work on April 26 or 29 because they were rained out. However his timecard indicates that he worked 8 hours on April 26. Therefore I do not credit his assertion that he did not work that day. Dennis further testified in sum as follows: When he reported to work on Tuesday, April 30, Company Project Director Jim Davidson told him to see Superintendent Johnson about a union problem. Dennis went to the company facility. Johnson told him that Local 768 Business Manager Young called, that Dennis needed to pay the balance of his initiation fee and back dues, and when he got straightened out he could return to work. Dennis knew that he was behind in dues. He immediately called Young, who said Dennis had to pay the balance of his initiation fees and back dues for the period when he was laid off. Young said that when Dennis did this, he would be a member in good standing as far as Young was concerned. Young did not indicate the amount owed. He also told Dennis to contact Business Manager Bolton if he wanted to work at Carrollton, in order to notify him that Dennis was working in his jurisdiction. Dennis made an appointment to pay the money owed the next day.

Dennis further testified in sum as follows: On April 30 he tried to reach Business Manager Bolton by phone. He left a message on Bolton's answering machine, leaving his mother-in-law's telephone number. Dennis did not have a telephone. His mother-in-law, Alberta Pike, who lived two doors away, did have a telephone. They had an intercom system which enabled them to communicate. The next morning Pike told Dennis that Bolton was on the phone. Dennis came to Pike's home and picked up the telephone in the living room. There was also an extension in the bedroom. Dennis recognized Bolton's voice. Bolton cussed out Dennis for about 30 seconds. He demanded to know what Dennis was doing working in his jurisdiction without notifying him. Dennis said he was under the impression that if he worked in Local 118's jurisdiction, dues were taken out and sent to Local 118. Dennis said he contacted Young to arrange to pay the balance of his initiation fee and dues. Bolton replied that he didn't care what Dennis did with Local 768. He said that Dennis had to pay him a $500 initiation fee that day or the next, and come in as a Class B painter, taking a pay cut of $2.50 per hour until he proved himself or the Company stated he should be classified as a Class A painter. Dennis agreed to Bolton's demands, except immediate payment of $500. Dennis said he wanted to make installment payments. Bolton said no, he had to have the money up front, and Dennis would forfeit his payments to Local 768. Dennis said he would pay Local 768 the money which he owed. Bolton said that if Dennis did that he would be blackballed from the Louisville area and lose his job with the Company. Bolton said he had men sitting on the bench while Dennis was out working in his jurisdiction. (Dennis subsequently testified that Bolton said he would be blackballed and lose his job if he did not pay the $500.) The conversation lasted about 6 or 7 minutes. The next day Dennis went to Local 768 and paid the balance of his initiation fees and dues. Business Manager Young said that as far as he was concerned, Dennis was a member in good standing, and should not have been pulled off the job in Carrollton. Young said he spoke to Bolton, but did not tell Dennis what was said. That afternoon Dennis returned to the company facility. Superintendent Johnson asked him if his union business was squared away. Dennis answered yes. Johnson asked which local. Dennis answered ''Local 768.'' Johnson said he could not send Dennis back to Carrollton, that he could only work in Local 768's jurisdiction, and that he would have to lay off Dennis until work resumed at the Toyota plant. Johnson promised he would call Dennis as soon as something came up. But when Dennis applied for unemployment compensation, he learned he was discharged. In October 1991, after the present complaints issued, Dennis transferred into Local 118, paid an initiation fee, 3 months' dues and other charges, and was classified as a Class A painter. The Company then offered him employment.

Alberta Pike, who was called as a General Counsel witness, testified in sum as follows: One day in the last week of April, Bolton called between 10 and 11 a.m. and asked to speak to Dennis. After Dennis came and got on the phone in her living room, she picked up the receiver in her bedroom to hang it up. Pike variously testified that Dennis and Bolton had been talking 3 or 4 minutes, 1 or 2 minutes, and that she did not know how long. When she picked up the receiver she heard Bolton cussing out Dennis. She listened in for 1 or 2 minutes. Bolton was talking in a loud and belligerent manner. She heard him tell Dennis to bring $500 tomorrow to join the Union, or Bolton would see that he was blackballed and never work in Louisville again. She then put down the phone. The conversation continued, and Dennis kept saying ''yes sir, yes sir.'' After the conversation Dennis told her what Bolton said, and that he didn't know where he would get $500. Pike said she couldn't help him.

Business Manager Bolton testified in sum as follows: He did not meet or communicate with Dennis until Saturday, April 27. That day Bolton went to a weekend shutdown job at Phillip Morris to check the status of employees of union contractors on the job. He went to the plant cafeteria, and greeted employees as they arrived. Bolton was talking with

Company Project Director Davidson, Foreman Fred McKim, and one Roger Strong. Dennis arrived and signed in. Bolton said, ''I don't believe I know you.'' Dennis identified himself. Bolton said he didn't have a member by that name, and asked where he was from. Dennis answered he was from Lexington Local 768. Bolton asked for his work card, which is his usual procedure. Dennis said he didn't have it with him. This was not unusual with union members, but it was unusual for a member of another local to fail to bring his work card with him. After their conversation Dennis left the premises, signing out at the guard shack. Bolton did not see him after that. On Monday, April 29, Bolton called Business Manager Young, and asked if Dennis was a member of Local 768. Young answered that he was not. Bolton then called Superintendent Johnson. He told Johnson that he learned Dennis was not a member of Local 768, and that he also was not a member of Local 118. Johnson said he would ''deal with it.'' Bolton did not tell Johnson to discharge Dennis. The employer is responsible for disciplining the employee. Johnson subsequently told him that he told Dennis to see Bolton and ''get his book straightened up.'' However, in his investigatory affidavit Bolton stated that ''Johnson told me he had told Dennis to see Ron Bolton and see about joining 118.'' Bolton initially testified that he had no further conversation with Johnson about the matter. However, in his affidavit he stated that Johnson told him that ''Dennis had not done what he told him to do, go down to 118 and sign up,'' and that Dennis was not working for the Company at that time. On being confronted with his affidavit, Bolton admitted Johnson so informed him. Bolton categorically denied having the alleged telephone conversation with Dennis, or demanding $500 from him, or threatening to blackball Dennis. Bolton later learned that Dennis made partial payments to Local 768. However, these payments did not qualify him to work as a union member, and would be forfeited in accordance with the International constitution. Bolton did not see or talk to Dennis again until October 1991 when he cleared into Local 118.

Company Project Director Davidson, who was called as a union witness, testified in sum as follows: He worked with Dennis on the General Electric and Dow Corning jobs. He also saw Dennis at a Phillip Morris shutdown, although Dennis did not work that day. Davidson was in the plant cafeteria with Bolton and Foreman Fred McKim. He saw Bolton speak to Dennis, but did not hear their conversation. Following the conversation Dennis left the cafeteria. Davidson initially testified that he thought this occurred around the time they were working at Dow Corning (i.e., in March or April 1991), but subsequently indicated he was not certain about this. Davidson also testified that he did recall telling Dennis to see Johnson.

Superintendent Johnson testified in sum as follows: There was a shutdown job at Phillip Morris in April, and he told Foreman Keenan Holden to notify a number of employees, including Dennis, to report. Johnson was not present at the job. In late April Bolton called and told him that Dennis was not a member of any union, and he needed to see Dennis. Johnson said he would take care of that. Bolton did not demand Dennis' discharge, or say anything about money. Johnson then told Foreman Holden (not Davidson) to have Dennis see him. Johnson told Dennis that he had to get right with Bolton if he wanted to work at the Dow Corning job, because it was in Local 118's jurisdiction. At the time the Company had no available work in Local 768's area. He did not tell Dennis he had to join Local 118. Johnson does not recall talking to Business Manager Young about the matter. Some time later (more than a couple of days), Dennis returned and said he was caught up with Local 768. Johnson told him he had to get straight with Local 118 in order to work in its area. Dennis said he would return when he got straightened out. Thereafter Dennis simply failed to show up until he eventually cleared into Local 118, whereupon Johnson put him to work.

Johnson asserted that the Company did not discharge or lay off Dennis, nor did it take the position that an employee must join Local 118 to be employed, or that Dennis refused to join and was let go for that reason. Johnson's assertions were contradicted by the Company's statements of position, including Johnson's own statement. When Dennis filed a claim for unemployment compensation, the Company was requested to give its position. The Company by its payroll clerk Linda Walls gave a written statement that ''Dennis was instructed by his supervisor that as a condition of employment he would have to join Painters Local 118,'' and that ''he did not join this union so he was discharged.'' Johnson admitted in his testimony that Walls was responsible for dealing with unemployment compensation claims, that she would routinely ask the supervisor ''what the deal is,'' that he was the supervisor to whom she referred, and that Walls did ask him what happened. Nevertheless Johnson insisted that he only told Walls that as far as he knew Dennis had ''not got straight with the Local yet.'' The factfinding report of the Kentucky Division of Unemployment Insurance, dated May 31, 1991, indicated that its investigator contacted Johnson. The report indicated that Johnson said Dennis was let go because he refused to join Local 118, that he chose to join Local 768, but the Company had no work in the Lexington area now, and Dennis would have to join Local 118 in order to work here now. Johnson was evasive about the report. He testified that he guessed he talked to the investigator, but did not recall. The Division of Unemployment Insurance held that Dennis was not disqualified from receiving benefits because he was discharged when he refused to join the Union, although his ''contract of hire'' did not require him to join the Union to remain employed.

In its statement of position to the Board's Regional Office concerning the present charges, company counsel stated as follows:

> Whitehouse is a union contractor and has a Union Security Agreement with Local Union 118 of the International Brotherhood of Painters & Allied Trades. The Union Agreement requires membership in Local 118 while working in Local 118 jurisdiction as a condition of employment. Mr. Dennis was informed by the Union of this provision and he failed to join the union whereupon he could no longer be employed under the Collective Bargaining Agreement.
>
> At the time this matter arose, Mr. Dennis was not a member of any union and he was working within the jurisdiction of Local 118, therefore, he was required to be a 118 member of which he refused.

I find that Johnson authorized and made the statements indicated to the Kentucky Division of Unemployment Insurance. As indicated, neither Dennis nor Johnson testified that Johnson told Dennis that he was discharged. In light of the position statements made by the Company to the Division of Unemployment Insurance and to the Board's Regional Office, which may properly be considered as company admissions, I find that the Company discharged Dennis because he failed to join the Union.

With regard to the three alleged disputed conversations between Bolton and Dennis, I have as previously indicated found neither to be a wholly credible witness. Upon consideration of the evidence, I find that all three conversations occurred, specifically, the conversation in August 1990 described by Dennis, the April 27 conversation described by Bolton, and the telephone conversation (on May 1), testified to by Dennis. As indicated, Superintendent Johnson admitted in his testimony that he told Dennis he had to contact Bolton and get straight with Local 118 in order to work in its area. Dennis was now trapped. He knew he had to comply if he wanted to continue working. He was also under the impression that he could obtain clearance from Bolton if he were paid up in his dues and initiation fees to Local 768. In these circumstances it is probable that as Dennis testified, he contacted Bolton. It is also unlikely that Dennis and Alberta Pike made up the telephone conversation out of whole cloth. I do not attach significance to Pike's testimony that she heard ''cussing and spluttering,'' although Dennis testified that Bolton cussed him out for about the first 30 seconds of the conversation. Pike's standard of what constituted cussing may have been different from that of Dennis. Bolton was obviously angry. He believed with some justification that Dennis was a deadbeat who had worked for the Company for nearly a year without joining either Local 118 or Local 768, and lied to him about it. Bolton was in no mood to grant concessions. I further find that at the time he spoke to Dennis, Bolton was under the mistaken impression that Local 118's initiation fee was $500. On March 14 the Union's membership voted to increase the journeymen initiation fee from $275 to $500, effective April 1. However, under the International constitution, a Local's increase in the initiation fee is not effective until approved by the International's general executive board. By letter dated July 18, 1991 (after the present charge was filed), Bolton informed International Secretary-Treasurer Monroe that Local 118 President Jones ''brought to my attention'' that the increase had not been approved by the board. By letter dated August 6, 1991, Monroe informed Bolton that the increase was approved as of August 5, 1991. The language of Bolton's letter suggests that he overlooked the fact that the increase had not been approved.

If the April 27 jobsite encounter did not occur, then the record evidence fails to indicate how Bolton learned that Dennis was not a member of Local 768. It is unlikely that Business Manager Young would have volunteered such information, and it is also unlikely that Superintendent Johnson would have taken the initiative in the matter without hearing from either Bolton or Young. It is also significant that Dennis testified that he recognized Bolton's voice on the telephone. This is unlikely if Dennis had spoken to him only once nearly a year ago. However, it would be likely if Dennis had recently spoken to Bolton, particularly under circumstances that he would not easily forget. Dennis testified that he did not work on a Phillip Morris shutdown job in April, and there is no timecard showing that he did such work. However, the testimony of Bolton and Davidson indicates that Dennis did not work that day, but immediately left after Bolton questioned him.[2] It is not improbable that Bolton, over the course of nearly a year, would go to two Phillip Morris shutdown jobs to check employee status. These are large jobs which must be done in a short time. Contractors will draw on all available employees. The jobs usually involve overtime pay, and consequently employees are eager to obtain such work. The jobs afford a business manager like Bolton an opportunity to find a large number of employees in one place at one time, where he can check on their status and do some politicking. I further find that Johnson initially told Dennis that he could return to work if he paid his obligations to Local 768. Johnson, like Dennis was under the impression that this would satisfy Bolton. When Johnson learned otherwise from Bolton, he told Dennis that he could not work in Local 118's jurisdiction.

I find that in August 1990 Bolton encountered Dennis on a Phillip Morris shutdown job, and asked about his status. Bolton accepted Dennis' representation that he was in an initiation program with Local 768. On the basis of that representation, Bolton did not object to Dennis working in Local 118's geographic jurisdiction. He also offered Dennis the option of transferring into Local 118 after he was fully paid up to Local 768. Bolton next encountered Dennis on April 27, 1991. He may or may not have remembered Dennis. However, he became suspicious when Dennis failed to produce a work card, and thereafter hastily departed the premises. Dennis knew he was in trouble, because after nearly a year of employment with the Company he had not yet fulfilled what he understood were his financial obligations to Local 768. He promptly disappeared, hoping that Bolton might again overlook his working in Local 118's jurisdiction. However, Bolton followed through and checked on Dennis' status. Business Manager Young told him that Dennis was not a member of Local 768. Bolton then called Superintendent Johnson and told him that Dennis was not a member of any Painters' Union. Bolton did not expressly request or demand that the Company discharge Dennis. However, Bolton knew that Johnson understood he was invoking the union-security clause of their contract, which required union membership after the eighth day of employment as a condition of employment. Bolton testified that if any employee failed to meet the financial requirements of union membership, the union-security clause would apply, and that it was up to the employer to discipline the employee. Therefore the Union, at the least, attempted to cause the Company to lay off Dennis and exclude him from any employment within Local 118's geographical jurisdiction, and in fact caused the Company to discharge Dennis.

When Dennis contacted Bolton, Bolton presented the employee with his demands, which were a precondition for Dennis returning to work. For several reasons, the demands, and Bolton's action in causing the Company to terminate

[2] I find without merit, General Counsel's suggestion that Bolton may have confused Dennis with his stepbrother William Skagges. Dennis testified in sum, but Johnson denied, that Johnson may once have confused them. However, Bolton testified that he did not know Skagges.

Dennis' employment, were unlawful. First, Bolton demanded payment of a $500 initiation fee, although the Union's initiation fee was only $275. Bolton mistakenly believed that the fee was $500. However, even when he learned otherwise, he did not bother to notify Dennis. Therefore Bolton caused Dennis' discharge and threatened to blackball him in the Louisville area ''for reasons other than the failure of the employee to tender the periodic dues and initiation fees *uniformly required* as a condition of acquiring or retaining membership'' (emphasis added). Second, Bolton's demand that Dennis take a $2.50 per hour pay cut and be reduced to a Class B level painter, was discriminatory and unlawful. Bolton testified that a journeyman member in good standing of another local who came into Local 118's jurisdiction would get the Class A rate, but a new union member would be employed at the B rate. In sum, the Union interpreted the contract in a manner which favored union members over nonmembers or new members, solely on the basis of union membership and without regard to their qualifications. Dennis was paid as a Class A painter. He testified without contradiction that at the time of his discharge he was a journeyman painter preparing to be a leadman. Therefore it is evident that the Company recognized that Dennis met the skill level requirements of a Class A painter, and was entitled to that rate under the contract. Third, neither the Company nor the Union accurately or adequately informed Dennis of his obligations and rights under their union-security agreement. Superintendent Johnson misled Dennis by sending him to Local 768, although he had no obligation to that Local, and thereby created the false impression that whatever arrangement Dennis made with Business Manager Young would enable him to work for the Company in the geographic jurisdiction of any Painters' Union local. When Bolton first met Dennis, he similarly led Dennis to believe that if he complied with Young's requirements he would have no problem transferring into Local 118 or working within Local 118's jurisdiction. Neither said anything to Dennis about the union-security clause or the 90-day time limit on payment of the initiation fee, or of the other charges required for membership. The evidence fails to indicate that Young informed Dennis of these requirements. Bolton testified that if he learned the Company hired a nonmember, he would request the Company to get a permission slip for deductions. Otherwise the employee could make payments directly to the Union. Although the Company has such forms, neither the Company nor the Union offered the form to Dennis when he began working in Local 118's geographic jurisdiction, or at any other time. Therefore Dennis remained entitled to the same installment payment option as other new members. ''A labor organization has an absolute fiduciary duty to inform unit employees of their obligations under a union security agreement, including the consequences of their failure to comply with those obligations, and the correct particulars of any obligations due and owing, and to afford the employees a reasonable opportunity to comply with those obligations before invoking a request for their discharge for noncompliance with such obligations. It is immaterial that the employee may already be aware of those obligations, and the consequences of failing to meet those obligations. Rather, before taking any action which could affect an employee's job security, the labor organization must confirm that the employee personally received full and understandable notice of those obligations.'' *Teamsters Local 170 (Consolidated Beverages)*, 282 NLRB 812, 817 (1987), and cases cited therein. As Bolton failed to fulfill his fiduciary duty, it follows that Local 118 violated Section 8(b)(1)(A) and (2) of the Act by causing and attempting to cause the Company to cease using Dennis' services. Bolton's threat to blackball Dennis in the Louisville area was unlawful for the additional reason that it went beyond the limits of the union-security clause, by threatening to prevent Dennis from working for other employers. However, I do not agree with General Counsel's argument that the Union unlawfully failed to offer Dennis the option of financial core membership. That has nothing to do with the facts of this case. Dennis was no champion of the open shop. He was perfectly willing to join any Painters' local. His problem was his reluctance to meet the financial obligations of such membership. And Bolton could not care less whether Dennis became a full-fledged, oath-taking member, so long as he met the financial obligations of membership. Indeed his statements and failure to contact Dennis indicate that he would have been satisfied if Dennis walked away from his employment without paying anything.

I further find that the Company violated Section 8(a)(1) and (3) of the Act by discharging Dennis because he failed to join Local 118. Even if the Union lawfully and properly invoked the union-security clause of its contract with the Company (which it did not), the Company went beyond the requirement of that contract by discharging Dennis, thereby precluding him from working even on jobs outside Local 118's geographic jurisdiction. The Company could lawfully at most lay off Dennis and inform him that he could not work in Local 118's jurisdiction until he met his financial obligations to that Union. Instead, by discharging Dennis, the Company unlawfully encouraged membership in a labor organization. Moreover, the Company terminated Dennis notwithstanding that it had reasonable grounds for believing that membership in Local 118 was not available to Dennis on the same terms and conditions generally available to other members. Superintendent Johnson initially misled Dennis by leading him to believe that his only obligation was to meet such requirements as might be imposed by Local 768. The Company always knew that Dennis was not a member of Local 118. (He always indicated on his timecards that he was a member of Local 768.) When Dennis began working in Local 118's geographic area, the Company did not inform him of the union-security agreement or offer him an authorization form to withhold payments on the initiation fee. Even when Johnson first spoke to Dennis on April 30, he still led Dennis to believe that his only obligation was to pay the balance of his initiation fee and dues to Local 768. When Dennis reported to Johnson that he had done this, Johnson nevertheless said he could not work in Local 118's jurisdiction, and discharged him because he had not joined 118. It is evident that Johnson knew or had reason to believe that Bolton did not offer Dennis the option to which he was entitled under the contract and International constitution, of paying the initiation fee in installments over a 90-day period. At the least, Johnson was under a legal obligation to investigate the matter. He did not, and the Company violated Section 8(a)(1) and (3) by terminating Dennis. *Forsythe Hardwood Co*., 243 NLRB 1039, 1045 (1979); *Conductron Corp.*, 183 NLRB 419, 427–428 (1970).

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By attempting to cause and causing the Company to cease employing James Dennis for lack of membership, although such membership was denied on grounds other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership, and without first giving Dennis adequate and correct notice of his financial obligations and a reasonable opportunity to comply with those obligations, the Union engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. By threatening Dennis that he would be blackballed, and by threatening him with loss of employment unless he complied with its improper and unlawful demands, the Union violated Section 8(b)(1)(A) of the Act.

5. By discharging Dennis for lack of membership in the Union, and notwithstanding that it had reasonable grounds for believing that the Union did not give him adequate and correct notice of his financial obligations and a reasonable opportunity to comply with those obligations, the Company engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents violated Section 8(a)(3) and (1) and Section 8(b)(2) and (1)(A) of the Act, I shall recommend that they be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Company and the Union be ordered jointly and severally to make whole James Dennis for any loss of earnings and benefits he may have suffered by reason of the discrimination against him, in accordance with *Claremont Resort Hotel & Tennis Club*, 260 NLRB 1088 (1982). The Company shall be ordered to expunge from its records any reference to the unlawful termination of Dennis, to inform him in writing of such expunction, and to inform him that its unlawful conduct will not be used as a basis for further personnel actions against him. The evidence indicates that the Union informed the Company in good faith that it no longer objected to his employment, and that the Company promptly reinstated him to his former position. Therefore no affirmative remedy is necessary in these regards. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3] For the reasons previously discussed, backpay shall be calculated at the Class A Painter rate which Dennis was receiving at the time of his termination, and the Company is not excused from its backpay obligation by reason of the fact that Dennis stated on his employment application that he was a member of Local 768. The Company shall be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

A. Respondent Irvin H. Whitehouse & Sons Co., Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Encouraging membership in International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union 118, AFL–CIO, or any other labor organization of its employees, by discharging employees or in any other manner discriminating against them in regard to hire or tenure of employment or any term or condition of employment, except to the extent permitted in Section 8(a)(3) of the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Union, make whole James Dennis for any loss of earnings and benefits he may have suffered by reason of the discrimination against him, as set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the termination of James Dennis, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Louisville, Kentucky facility and at each of its jobsites within the Union's geographical jurisdiction, copies of the attached notice marked ''Appendix A.''[5]

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Company has taken to comply.

B. Respondent International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union 118, AFL–CIO, Louisville, Kentucky, its officers, agents, and representatives, shall

1. Cease and desist from

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[3] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(a) Causing or attempting to cause Irvin H. Whitehouse & Sons Co., Inc. to terminate or discriminate against employees by invoking the union-security agreement of their collective-bargaining contract, where union membership was denied or terminated on grounds other than failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership, or without first informing such employees of their obligations under the union-security agreement, including the consequences of their failure to comply with those obligations, and the correct particulars of any obligations due and owing or without affording them a reasonable opportunity to comply with those obligations.

(b) Threatening employees that they will be blackballed, or threatening them with loss of employment unless they comply with improper or unlawful demands.

(c) In any like or related manner restraining or coercing employees of the employer in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Company, make whole James Dennis for any losses he may have suffered by reason of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Post at its office copies of the attached notice marked ''Appendix B.''[6] Copies of the notice on forms to be provided by the Regional Director for Region 9, after being signed by Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Furnish to the Regional Director for Region 9, signed copies of the notice for posting by Respondent Company in places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Union has taken to comply.

[6] See fn. 5, above.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT encourage membership in International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union 118, AFL–CIO, or any other labor organization of our employees, by discharging employees or in any other manner discriminating against them in regard to hire or tenure of employment or any term or condition of employment, except to the extent permitted in Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

WE WILL jointly and severally with Local 118 make whole James Dennis for any loss of earnings and benefits he may have suffered by reason of the discrimination against him, with interest.

WE WILL expunge from our files any reference to the termination of James Dennis, and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

IRVIN H. WHITEHOUSE & SONS CO., INC.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Irvin H. Whitehouse & Sons Co., Inc. to terminate of discriminate against employees by invoking the union-security agreement of our collective-bargaining contract, where union membership was denied or terminated on grounds other than failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or maintaining membership, or without first informing such employees of their obligations under the union-security agreement, including the consequences of their failure to comply with those obligations, and the correct particulars of any obligations due and owing, or without affording them a reasonable opportunity to comply with those obligations.

WE WILL NOT threaten employees that they will be blackballed, or threaten them with loss of employment unless they comply with improper or unlawful demands.

WE WILL NOT in any like or related manner restrain or coerce employees of Whitehouse in the exercise of their right to engage in union or concerted activities, or to refrain therefrom.

WE WILL jointly and severally with Whitehouse, make whole James Dennis for any loss of earnings and benefits he may have suffered as a result of the discrimination against him, with interest.

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES OF THE UNITED STATES AND CANADA, LOCAL UNION 118, AFL–CIO